

**Office of Chief Counsel
Internal Revenue Service
Memorandum**

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to: Holly L. McCann
Chief, Excise Tax Program

from: Frank Boland
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subject: Application of Section 4043 Tax on Fuel Used in Fractional Ownership Aircraft Programs

This Chief Counsel Advice responds to your request for assistance dated February 13, 2012. This advice may not be used or cited as precedent.

ISSUES

1. Under the facts described below, whether Aircraft ABCD and Aircraft EFGH are part of the same fractional ownership aircraft program for purposes of § 4043 (tax on fuel used in fractional ownership aircraft programs) of the Internal Revenue Code (Code).
2. Under the facts described below, whether fuel used in Aircraft EFGH for a flight taken by Owner A is taxed by § 4043.
3. Under the facts described below, whether fuel used in non-program Aircraft NP for a flight taken by Owner A is taxed by § 4043.
4. Under the facts described below, whether fuel used in Aircraft ABCD or Aircraft EFGH for a flight chartered by a non-fractional aircraft owner (a member of the general public) is taxed by § 4043.

5. If we conclude that that the fuel used in the aircraft in Issues 2, 3, or 4 is not taxed under § 4043, whether the amount paid for the flight is taxed by § 4261 (excise tax on transportation of persons by air).

CONCLUSIONS

1. Under the facts described below, Aircraft ABCD and Aircraft EFGH are part of the same fractional ownership aircraft program for purposes of § 4043.
2. Under the facts described below, fuel used in Aircraft EFGH for a flight taken by Owner A is taxed by § 4043 (tax on fuel used in fractional ownership aircraft programs).
3. Under the facts described below, fuel used in non-program Aircraft NP for a flight taken by Owner A is not taxed by § 4043.
4. Under the facts described below, fuel used in Aircraft ABCD or Aircraft EFGH for a flight chartered by a member of the general public is not taxed by § 4043.
5. Amounts paid for the flights described in Issue 3 and Issue 4 are taxed by § 4261.

FACTS

A fractional ownership program manager (Program Manager) manages a fleet of two aircraft, Aircraft ABCD and Aircraft EFGH (Program Aircraft). The Program Aircraft are in the same fractional ownership dry-lease aircraft exchange arrangement (Arrangement).

The Program Aircraft are subsonic, fixed wing aircraft registered in the United States and are listed as fractional program aircraft in the management specifications issued to Program Manager by the Federal Aviation Administration (FAA) under subpart K of 14 CFR part 91. Aircraft Owners A, B, C, and D each own a 1/4 fractional interest in Aircraft ABCD. Aircraft Owners E, F, G, and H each own a 1/4 fractional interest in Aircraft EFGH (Aircraft Owners A, B, C, D, E, F, G, and H referred to individually as an 'aircraft owner' and collectively as 'aircraft owners'). When the aircraft in which an aircraft owner has an interest is not available for the aircraft owner's use, Program Manager provides a different aircraft from the Program Manager's pool of Program Aircraft and non-program aircraft, including Aircraft NP, described below. Each aircraft owner entered into the following agreements:

- Aircraft Purchase Agreement with aircraft interest seller – this agreement conveys title for a fractional interest in a specific aircraft to an aircraft owner. A person typically, but not necessarily, purchases its interest in a fractional program aircraft from Program Manager or an entity related to Program Manager.

- Management Agreement with Program Manager – in this multi-year agreement, Program Manager assumes full responsibility for the maintenance and operation of aircraft ABCD and EFGH.
- Joint Ownership Agreement with other owners of aircraft owner's aircraft – this multi-year agreement facilitates sharing of a particular aircraft between the owners of that aircraft. For example, Aircraft Owners A, B, C, and D enter into a Joint Ownership Agreement with respect to Aircraft ABCD. Aircraft Owners E, F, G, and H enter into a Joint Ownership Agreement with respect to Aircraft EFGH.
- Dry-lease aircraft exchange agreement with all other aircraft owners in the Arrangement – this multi-year agreement facilitates sharing of the Program Aircraft with other aircraft owners who participate in Program Manager's fractional ownership program.

Program Manager also owns and operates Aircraft NP. Aircraft NP is not a part of the fractional ownership program and Program Manager charts the aircraft to third parties. Aircraft NP is registered with the FAA under 14 CFR part 135 as a charter aircraft.

LAW AND ANALYSIS

Section 4043 was added to the Code by section 1103 of the FAA Modernization and Reform Act of 2012 (Act) (Pub. L. 112-95) and applies to fuel used after March 31, 2012.

Section 4043(a) imposes a tax on any liquid used in a fractional program aircraft as fuel (1) for the transportation of a qualified fractional owner with respect to the fractional ownership aircraft program of which such aircraft is a part, or (2) with respect to the use of such aircraft on account of such a qualified fractional owner, including use in deadhead service.

Section 4043(c)(1) defines 'fractional program aircraft' with respect to any fractional ownership aircraft program, as any aircraft that (A) is listed as a fractional program aircraft in the management specifications issued to the manager of such program by the FAA under subpart K of 14 CFR part 91, and (B) is registered in the United States.

Section 4043(c)(2) defines 'fractional ownership aircraft program' as a program under which:

(A) A single fractional ownership program manager provides fractional ownership program management services on behalf of the fractional owners;

(B) There are one or more fractional owners per fractional program aircraft, with at least one fractional program aircraft having more than one owner;

(C) With respect to at least two fractional program aircraft, none of the ownership interests in such aircraft are (i) less than the minimum fractional ownership interest, or (ii) held by the program manager;

(D) There exists a dry-lease aircraft exchange arrangement among all of the fractional owners; and

(E) There are multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program.

Section 4043(c)(3)(A) defines 'qualified fractional owner' as any fractional owner that has a minimum fractional ownership interest in at least one fractional program aircraft. Section 4043(c)(3)(B) defines 'minimum fractional ownership interest' as including a fractional ownership interest equal to or greater than 1/16 of at least one subsonic, fixed wing, or powered lift aircraft.

Section 4043(c)(3)(A) defines 'fractional ownership interest' as (i) the ownership of an interest in a fractional program aircraft, (ii) the holding of a multi-year leasehold interest in a fractional program aircraft, or (iii) the holding of a multi-year leasehold interest which is convertible into an ownership interest in a fractional program aircraft. Section 4043(c)(3)(D) defines 'fractional owner' as any person owning any interest (including the entire interest) in a fractional program aircraft.

Section 4043(c)(4) defines 'dry-lease aircraft exchange' as an agreement, documented by the written program agreements, under which the fractional program aircraft are available, on an as needed basis without crew, to each fractional owner.

Section 4261(a) imposes a tax on the amount paid for the taxable transportation of any person. "Taxable transportation" includes transportation by air that begins and ends in the United States. Section 4261(d) provides that the tax is paid by the person making the payment subject to tax and § 4291 provides that the tax is collected by the person receiving the payment.

Notice 2012-27, IRB 2012-17, provides that the fractional ownership program manager, rather than fractional owners, is liable for the tax imposed by § 4043.

You asked whether fuel used in certain flights by certain individuals is taxed by § 4043(a). To determine whether fuel used in a flight is taxed by § 4043(a), we must first determine whether the Arrangement is a fractional ownership aircraft program under § 4043(c)(2). If we determine that the Arrangement is a fractional ownership aircraft program, we must then determine whether the aircraft used for a particular flight

is a fractional program aircraft under § 4043(c)(1). Finally, if we determine that the aircraft used for a particular flight is a fractional program aircraft, we must determine whether the person transported on the flight is a qualified fractional owner under § 4043(c)(3)(A) or whether the flight was made on account of a qualified fractional owner.

Issue 1

An arrangement must satisfy each factor of the five-factor definition provided in § 4043(c)(2) to be a fractional ownership aircraft program for purposes of the tax imposed by § 4043(a). The Arrangement involves a single fractional ownership program manager that provides fractional ownership program management services on behalf of aircraft owners. Thus, the Arrangement satisfies § 4043(c)(2)(A). The Arrangement also involves two aircraft, each with more than one owner. Thus, the Arrangement satisfies § 4043(c)(2)(B).

Each aircraft owner owns 1/4 of its respective aircraft, which is greater than the 1/16 interest required to satisfy the minimum fractional ownership interest requirement. Further, Program Manager does not own an interest in the Program Aircraft. Thus, the Arrangement satisfies § 4043(c)(2)(C).

The Arrangement also includes a dry-lease aircraft exchange arrangement among all aircraft owners, and there are multi-year program agreements covering the fractional ownership, fractional ownership program management services, and dry-lease aircraft exchange aspects of the program. Thus, the Arrangement satisfies § 4043(c)(2)(D) and (E). The Arrangement satisfies each factor of the five-factor definition provided in § 4043(c)(2). Accordingly, we conclude that the Arrangement described in the facts is a fractional ownership aircraft program for purposes of the tax imposed by § 4043(a).

Issue 2

We determined that the Arrangement is a fractional ownership aircraft program. We must next determine whether the aircraft used for a particular flight is a fractional program aircraft under § 4043(c)(1). In Issue 2, you describe a flight taken by Owner A on Aircraft EFGH, an aircraft in which Owner A does not have an ownership interest. The Program Aircraft are listed as a fractional program aircraft in the management specifications issued to Program Manager by the FAA under subpart K of 14 CFR part 91. The Program Aircraft are also registered in the United States. Because the Program Aircraft satisfy the requirements of § 4043(c)(1)(A) and (B), the Program Aircraft are fractional program aircraft with respect to the fractional ownership aircraft program that includes the Program Aircraft.

We must next determine whether the person transported on the flight is a qualified fractional owner under § 4043(c)(3)(A) or whether the flight was made on

account of a qualified fractional owner. Because Owner A owns a 1/4 interest in Aircraft ABCD, Owner A satisfies the minimum fractional ownership interest in at least one fractional program aircraft with respect to the fractional ownership aircraft program that includes the Program Aircraft. Accordingly, A is a qualified fractional owner.

Issue 2 involves a fractional Program Aircraft (Aircraft EFGH) that transports a qualified fractional owner (Owner A). Therefore, the requirements of § 4043(a) are satisfied and the fuel used in this flight is taxed by § 4043(a). Pursuant to Notice 2012-27, Program Manager is liable for the tax imposed by § 4043(a).

Issue 3

In Issue 3, you describe a flight taken by Owner A on Aircraft NP. Aircraft NP is owned entirely by Program Manager and is not part of the fractional ownership aircraft program that includes the Program Aircraft. Also, Owner A is not a qualified fractional owner with respect to Aircraft NP. Therefore, Issue 3 does not involve a fractional program aircraft that transports a qualified fractional owner. Accordingly, the requirements of § 4043(a) are not satisfied and the fuel used in this flight is not taxed by § 4043(a).

Issue 4

In Issue 4, you describe a flight chartered by a member of the general public on the Program Aircraft. A member of the general public who does not own an interest in the Program Aircraft is not a qualified fractional owner. Therefore, Issue 4 does not involve a fractional program aircraft that transports a qualified fractional owner. Accordingly, the requirements of § 4043(a) are not satisfied and the fuel used in this flight is not taxed by § 4043(a).

Issue 5

You asked that if we conclude that the fuel used by the aircraft in Issues 2, 3, or 4 is not taxed under § 4043, whether the amount paid for the flight is taxed under § 4261. We concluded that the fuel used in the flights described in Issues 3 and 4 are not taxed under § 4043(a).

If fuel used in a flight is not taxed by § 4043(a) and an amount is paid for that flight, then the amount paid is taxed by § 4261(a) unless exempt from tax by the Code or under IRS published guidance. The flights described in Issues 3 and 4 are not taxed under § 4043(a), and are not covered by an exemption in the Code or IRS published guidance. Accordingly, we conclude that amounts paid for these flights are taxed under § 4261(a).

Please call (202) 622-3130 if you have any further questions.